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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1219

S. BUCHSBAUM & CO., A CORPORATION, ET AL.,
Appellants,

vs.

ROBERT L. GORDON, DIRECTOR OF LABOR OF THE STATE OF ILLINOIS,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS.

BRIEF OF APPELLANTS IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS APPEAL.

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Index of Authorities.

	PAGE
Atlantic & Pacific Tea Co. v. Grosjean, 301 U.S. 412 (1937)	5
Beers v. Glynn, 211 U.S. 477 (1909)	10
Carmichael v. Southern Coal Co., 301 U.S. 495	6
Fox v. Standard Oil Co., 294 U.S. 87 (1935)	5
Hanover Fire Insurance Co. v. Harding, 272 U.S. 494 (1926)	11
Liggett Co. v. Lee, 288 U.S. 517 (1933)	5
Lincoln Nat. Ins. Co. v. Read (No. 833 this Term)	3
Magoun v. Illinois Trust & Savings Bank, 170 U.S. 283 (1897)	4
New York Rapid Transit Corporation v. New York 303 U.S. 573 (1938)	10
Quaker City Cab Co. v. Penna., 277 U.S. 389 (1928)	5
State v. Donovan, 16 N.W. 2d 896 (1944)	12
Stewart Dry Goods Co. v. Lewis, 294 U.S. 550 (1935)	5
Tax Commissioners v. Jackson, 283 U.S. 527 (1931)	5

Statutes.

Iowa Code, 1939, Sec. 1551.13, as amended by Session Laws, 1943, Ch. 71, adding C-7	9
Wisconsin Statutes, 943, Sec. 108.17 (7)	9

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The issue as to jurisdiction depends upon the substantiality of the contentions of appellants respecting the denial to them of "equal protection of the laws" resulting from the discriminations and inequalities inherent in the classifications created by the war risk amendments to the Illinois Unemployment Compensation Law. The unlawful discriminations and inequalities complained of are particularized in our "Jurisdictional Statement," pp. 10-11.* We

* References herein to the "Jurisdictional Statement" are to the typewritten original.

there point out that our contentions are based in part upon the purely arbitrary inequalities and discriminations against appellants created by the provision appearing in both the third and fourth paragraphs of Section 18(c)(5)(B), making the war risk rates applicable only to that portion in excess of $100,000 of the 1944 payrolls of employers for whom war risk rates for 1944 were determined.

War risk rates were determined for 1944 only for those employers whose 1943 payrolls exceeded their "normal year" (1940) payrolls by more than 100%. Unconstitutional discriminations against appellants result therefrom both in favor of other war expanded employers whose 1944 payrolls did not exceed $100,000 and in favor of other war expanded employers whose 1944 payrolls did exceed $100,000. Because of our confidence in the manifest substantiality of our contentions resting upon this provision of the law we confine this reply thereto, at the same time disclaiming any intention to waive our other contentions.

The issue between us and appellee is clear-cut. We say this $100,000 exemption must bear some perceivable relation to the objectives and purposes of the war risk amendments or the law is unconstitutional. In the "Statement of Appellee," p. 12* appears the following:

> "Throughout appellants' argument runs the misconception that there must be a necessary relationship between the $100,000 exemption and 1940 payrolls and that the want of such a relationship renders the war risk amendments invalid."

and at p. 13 the following:

> " * * There is no necessary relationship between the $100,000 exemption and 1940 payrolls."

Our contention has never been confined rigidly to the existence of a logical relationship of $100,000 and 1940 pay-

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* Our page references throughout are to the typewritten original.

rolls. On the contrary, the requirement for which we contend has always been that some logical relationship exist between $100,000 and the objectives and purposes of the law. Our belief is that if such a relationship existed, it would necessarily involve the "normal year" (1940) payrolls, since the 1940 payrolls were adopted as the basis for the determination of the existence of excessive payroll expansion. Appellee has at no time pointed out the existence of any such relationship. Nor did the Supreme Court of Illinois or the Judge of the Illinois Circuit Court. The reason is manifest. There is none.

If there is no necessity for the existence of such a relationship it can only be because the constitutional guarantee of "equal protection of the laws" has ceased to protect against arbitrary and capricious state legislation in exercise of the police power in the economic field. We are confident that this Court would not leave recognition of such a profound doctrinal change to inference from orders entered without opinion in dealing with the preliminary question of jurisdiction. It would be announced in opinions rendered on the merits in cases raising the question.*

The "Statement of Appellee" devotes much space (pp. 3-7) to setting forth the great need of unemployment compensation laws and the dire consequences resulting from state unemployment compensation funds becoming bankrupt. No such issue is here presented. We concede that the Illinois Unemployment Compensation Law as a whole is constitutional and that the Illinois General Assembly has the power to amend it to protect the fund from bankruptcy, as well as to allocate more equitably the burden of such law as between employers enjoying excessive business expan-

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* On February 12, 1945, this Court noted probable jurisdiction in *Lincoln Nat. Ins. Co.* v. *Read*, (No. 833 this term), raising the issue of "equal protection of the laws" as to a state tax law.

sion during the war and other employers subject to the Act, provided only that the method of doing so involves no violation of the constitutional rights of any of the employers affected thereby.

We are not in this proceeding asking this Court to ignore or overrule any of the many dicta from its decisions which are referred to in the "Statement of Appellee" and which are the rationalizations by which this Court in each of those cases has expressed its conclusion that under the particular circumstances there presented the constitutional guarantee of "equal protection of the laws" had not been violated by the discriminations resulting from the legislative classifications attacked therein. Such dicta, read in the light of the circumstances of the cases causing their expression, are not applicable herein because there is no analogy as to the facts.

At pages 8-9 of the "Statement of Appellee" seven decisions of this Court are cited in support of the statement "The right of the Legislature to graduate rates as long as there is a *reasonable basis* for the distinction has been repeatedly sustained by this Court." (Emphasis ours) We heartily concur but the question remains whether there is any "reasonable basis" for the distinctions made by the war risk amendments.

In the earliest case cited by appellee, *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283 (1897) this Court in an opinion by Mr. Justice McKenna said: (p. 294)

> "And Mr. Justice Brewer, in *Gulf, Colorado & Santa Fe Railway* v. *Ellis*, 165 U. S. 150, 165, after a careful consideration of many cases, said: 'It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is **one based upon some reason-**

able ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.' " (Emphasis ours)

The decisions of this Court sustaining state laws levying excise taxes on the privilege of conducting business through chain store organizations neatly illustrate this distinction. Those laws have been repeatedly sustained.

Tax Commissioners v. *Jackson*, 283 U. S. 527 (1931).

Liggett Co. v. *Lee*, 288 U. S. 517 (1933).

Fox v. *Standard Oil Co.*, 294 U. S. 87 (1935).

Atlantic & Pacific Tea Co. v. *Grosjean*, 301 U. S. 412 (1937).

In *Liggett Co.* v. *Lee*, 288 U. S. 517 (1933), this Court sustained the Act as a whole; nevertheless, it held unconstitutional the single provision which laid a heavier tax per store on the owner whose stores were located in different counties than on the owner whose stores were all located in the same county. This Court was (p. 533) "unable to discover any reasonable basis for this classification." It asserted (p. 534) that "an increase in the levy not only on a new store but on all the old stores, consequent upon the mere physical fact that the new one lies a few feet over a county line, finds no foundation in reason or in any fact of business experience." It could find (p. 534) no "conceivable relation to the privilege enjoyed" in "the mere spacial relation between the store and a county line."

See also:

Stewart Dry Goods Co. v. *Lewis*, 294 U. S. 550 (1935).

Quaker City Cab Co. v. *Penna.*, 277 U. S. 389 at 400 (1928).

Appellee states that (Statement, p. 8)

> "The plain purpose of the classifications (created by the war risk amendments) is to graduate the rates of those employers whose rates of contributions have been reduced at a time when their abnormal expansion of payrolls and employment rolls due to the war is rolling up a potential liability against the Illinois Unemployment Trust Fund."

and (p. 9)

> "With respect to the graduation of rates betwen the other two classifications, (employers given 2% war risk rates with payroll expansions in excess of 100% and employers given 2.7% war risk rates with payroll expansions in excess of 150%) it is not unreasonable for the Legislature to make some allocation of responsibility on the theory that the greater the abnormal expansion of payrolls and employment rolls in the war period the greater the abnormal contraction of payrolls in the post-war period."

It is because the $100,000 provision does violence to these purposes of the law and is without logical relationship thereto that we assert that the law is unconstitutional. The percentage of expansion of payrolls between 1940 and 1943 of employers given war risk rates for 1944 is entirely independent of the first $100,000 of their 1944 payrolls. It obviously bears no relationship whatever to whether their 1944 payrolls exceed or amount to less than $100,000. The "Comparative Payroll Analysis of Selected Expanded Employers" (Appellee's Add. Abst., p. 19) furnished to the General Assembly in support of the effort to have the war risk amendments enacted, clearly demonstrates this fact.

The "Statement of Appellee" at p. 10 claims that we misconstrued the word "alone" in the opinion in *Carmichael* v. *Southern Coal Co.*, 301 U. S. 495 at 511 in our "Jurisdictional Statement" at p. 12. We submit, on the

contrary, that our statement fully accords with the context, which is as follows: (p. 511)

> "Administrative convenience and expense in the collection or measurement of the tax are **alone** a sufficient justification for the difference between the treatment of small incomes or small taxpayers and that meted out to others. (Citing cases.) We cannot say that the expense and inconvenience of collecting the tax from small employers would not be disproportionate to the revenue obtained." (Emphasis ours)

Appellee attempts to justify the $100,000 provision, so far as the discriminations against appellants in favor of war expanded employers with 1944 payrolls which do not exceed $100,000 are concerned, by pointing out that the $100,000 exemption applies not only to war expanded employers whose 1944 payrolls do not exceed $100,000 but also to war expanded employers whose 1944 payrolls do exceed $100,000. We submit, however, that that is a wholly immaterial matter. The 1940 "normal year" payrolls of employers subject to the Illinois Unemployment Compensation Act for whom war risk rates were determined for 1944 because of the excessive expansion of their 1943 payrolls varied greatly in size, many being substantially less than $100,000 and many being substantially more than $100,000. The figure of $100,000 has no ascertainable relationship of any kind thereto except a completely arbitrary one. No discernible reason for its selection exists. Its choice was wholly capricious.

Much is said in the "Statement of Appellee" regarding the legitimate interest of legislatures in protecting small businesses from the serious plight which has befallen them during the war. The inference is that the $100,000 exemption is to be explained upon this ground. The evidence presented to the General Assembly in support of the war risk amendments appears in the record. (Appel-

lee's Add. Abst. pp. 13-39). Nowhere does any such suggestion appear. Nowhere is any reference made to the $100,000 provision. The reason is obvious. Whatever the plight of small businesses by and large might be as a result of the war, those businesses which enjoyed payroll expansions between 1940 and 1943 by more than 100% were not among the sufferers. On the contrary, they are obviously "doing all right" under our war economy. Consequently, interest in improving the condition of small businesses impoverished by the war economy would not be served in the slightest by the $100,000 exemption in favor of businesses subjected to war risk rates because of their excessive payroll expansions between 1940 and 1943. The logical relationship necessary to sustain constitutionality cannot be found in the interest of the state in improving the lot of small businesses suffering curtailment and destruction as a result of the war economy.

An interesting illustration of the progress made by small businesses given war risk rates appears in the "Comparative Payroll Analysis of Selected Expanded Employers" furnished by the Commissioner of Placement and Unemployment Compensation of the Illinois Department of Labor to the Illinois Senate Committee on Industrial Affairs in support of his statement advocating enactment of the war risk amendments. (Appellee's Add. Abst. pp. 13, 19).

The "Statement of Appellee" (p. 14) points out that Alabama, Iowa, Minnesota and Wisconsin have war risk amendments which exempt small employers by making the rates applicable only to payrolls in excess of a stated amount. In that connection it should be noted that both the Wisconsin Legislature and the Iowa Legislature recognized the danger that such a provision would make the law unconstitutional. Both qualified the exemption created with the additional language:

"Unless it is finally determined that the application of this paragraph would invalidate this sub-section."*

We respectfully submit that the discriminations against appellants and in favor of war expanded employers with 1944 payrolls amounting to less than $100,000 are purely arbitrary and capricious and render the law unconstitutional.

In our "Jurisdictional Statement" at pp. 10-11 and 16-17 we demonstrate that the $100,000 provision actually has the effect, as between war expanded employers all of whose 1944 payrolls exceed $100,000, to extend more favorable treatment to employers with greater percentages of payroll expansion in contrast to the severer treatment of employers with smaller percentages of payroll expansion. Such inequalities not only bear no logical relationship to the purposes and objectives of the law, they actually defeat them. No attempt is made in the "Statement of Appellee" to demonstrate the unsoundness of this exposition. Appellee was wise in not attempting to do so. It could not be successfully done.

Appellee seeks to justify the arbitrary inequalities resulting from the $100,000 provision by reliance upon cases involving income tax, inheritance tax and other tax laws. We cited decisions of the Supreme Court of Illinois at p. 13 of the "Jurisdictional Statement" showing that the Illinois Unemployment Compensation law is not an exercise of the taxing power, but an exercise of police power. Appellee urges that this construction of the Illinois law is not binding on this Court (Statement, p. 11). It is true that this Court will not permit the Supreme Court of a State to evade the effect of a Federal constitutional man-

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* Sec. 1551.13 Iowa Code, 1939, as amended by Session Laws, 1943, Ch. 71, adding C-7; Sec. 108.18 (7) Wisconsin Statutes, 1943.

date by construing a state statute in a strained manner contrary to its obvious purport. However no case ever decided by this Court has held that it will refuse to accept as conclusive the construction of a state statute by the State Supreme Court because such construction results in its invalidity under the Federal Constitution.

The difference from the standpoint of equal protection of the laws between statutes passed in exercise of the police power and statutes passed to raise revenue is highlighted by *New York Rapid Transit Corporation* v. *New York*, 303 U. S. 573 (1938). There this Court pointed out that the use to which the revenue raised by a tax law will be appropriated is immaterial in determining the constitutional validity of the classifications made. It is sufficient that a classification contained in a tax law conform merely to the purpose of raising revenue. (See 303 U. S. at 585-587). Obviously, a police measure is different. The primary purpose of a revenue measure is to raise money. The purpose of provisions of a police measure providing for the raising of money is wholly incidental and ancillary to making the police regulation effective. It is axiomatic that to be constitutional the inequalities and discriminations created must bear some reasonable relationship to the objectives and purposes of the police regulation.

Moreover, the creation of exemptions is a time honored method which has always existed whereby the sovereign selects the subjects of taxation. Thus in *Beers* v. *Glynn*, 211 U. S. 477 (1909) this Court (quoting from *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283 at 299) said (p. 485):

> "Nor do the exemptions of the statute render its operation unequal within the meaning of the Fourteenth Amendment. The right to make exemptions is involved in the right to select the subjects of taxation and apportion the public burdens among them, and must consequently be understood to exist in the law-

making power wherever it has not in terms been taken away. To some extent it must exist always, for the selection of subjects of taxation is of itself an exemption of what is not selected. Cooley on Taxation, 200; see also the remarks of Mr. Justice Bradley in *Bell's Gap Railroad* v. *Pennsylvania*, 134 U. S. 232."

This is an obviously vitally important additional ground of distinction between revenue laws and police measures, so far as "equal protection of the laws" is concerned.

Appellee contends (Statement, p. 13) that since the Legislature might without discrimination among employers given war risk rates for 1944 and having 1944 payrolls in excess of $100,000, have made the war risk rates applicable to their entire 1944 payrolls, it necessarily follows that uniformly exempting from their application the first $100,000 of such payrolls does not invalidate the law. Such a conclusion ignores entirely the purpose of the law and the fact that the exemption of the first $100,000 of payroll has the effect of favoring employers with a greater percentage of payroll expansion as contrasted with those with a smaller percentage of payroll expansion. A provision producing a result exactly contrary to the purposes and objectives of the law certainly cannot be sustained because a different provision more drastic in character and consistent with the purposes and objectives of the law would not create unconstitutional discriminations between the same groups of persons. A state has the right to exclude foreign corporations entirely from engaging in intrastate business within its borders. Nevertheless, if it admits them upon compliance with conditions precedent, those conditions must not deny to any of them the "equal protection of the laws." *Hanover Fire Insurance Co.* v. *Harding*, 272 U. S. 494 (1926).

The "Statement of Appellee" at p. 14 asserts that our contentions based upon the arbitrary discriminations created among employers given war risk rates, all of whom

had 1944 payrolls in excess of $100,000 are "virtually tantamount to saying that between employers who are subject to the same war risk rates the employer with the largest payroll pays the most contributions." Such statement completely distorts our contention. We do not complain because employers with the largest 1944 payrolls pay the most contributions. That would be true if our contentions were adopted *in toto*. The purpose and objectives of the war risk amendments require that employers with the greatest percentages of payroll expansion between 1940 and 1943 should suffer with respect to their 1944 payrolls the maximum burden imposed by the war risk amendments, since they present the greatest potential benefit liability against the Unemployment Compensation Fund. Our complaint is that the $100,000 provision frustrates the purpose of the law, since it enables some employers to use their lower variable rates on a greater percentage of their 1944 payrolls than other employers with substantially smaller percentages of payroll expansion in 1943 over 1940.

Appellee points out that the Minnesota war risk amendments have been held constitutional by its Supreme Court (Statement, p. 7). The decision, (*State* v. *Donovan*, 16 N. W. 2d 896) is not relevant to the issues herein. The sole issue there was the validity of classification into separate groups of employers entering business after December 31, 1940 and employers engaged in business before that date. The Court found that December 31, 1940 was properly selected as the date dividing the "prewar normal peacetime economy" from the "abnormal war economy" and, therefore, that "there is a real reason for the classification." (16 N. W. 2d at p. 900) The Court there pointed out that (p. 898)

> "Whether a particular classification does or does not deny equal protection of the laws depends upon the particular situation presented in each case."

That case is obviously correctly decided and manifestly not in point herein.

The "Statement of Appellee", pp. 15-16, cites statistics to show that the Illinois General Assembly struck at the heart of the evil legislated against in the war risk amendments. Actually such statistics have nothing whatever to do with the case. Those statistics classify employers subject to the Act into two groups, (1) those given war risk rates in 1943 and 1944 by reason of their war expanded 1942 and 1943 payrolls, and (2) all other employers subject to the Act. Our attack, based upon the $100,000 provision, is based on unconstitutional discriminations between employers, all of whom are not only subject to the Act, but also were given war risk rates for 1944 based upon their excessively expanded 1943 payrolls. We base no contention upon the failure to include within the application of the war risk amendments employers whose payrolls did not expand at least 100% during 1943 over their 1940 payrolls.

In conclusion we submit with confidence that our contentions not only raise substantial issues, but in addition require a holding that the war risk amendments deny appellants "equal protection of the laws."

Respectfully submitted,

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